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No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CHABAD,

Petitioner,

and

COUNTY OF ALLEGHENY and CITY OF PITTSBURGH,

v.

AMERICAN CIVIL LIBERTIES UNION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Establishment Clause prevents a municipality from permitting the placement, at no taxpayer expense, of a Jewish symbol adjacent to a Christmas tree more than twice its size as part of the municipality's seasonal display.

2. Whether a municipality that erects a seasonal Christian display is required, by the Establishment Clause's prohibition against denominational preferences, to permit inclusion of a privately funded Jewish symbol.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The decision of the court of appeals is reported at 842 F.2d 655. It appears as Appendix I, pp. 1a-33a, *infra*. The oral opinion of the district court dated December 15, 1986, denying a preliminary injunction, and its Memorandum Opinion and Order dated May 8, 1987, denying a permanent injunction and declaratory judgment are not reported but are reprinted as Appendices II (pp. 34a-36a, *infra*) and III (pp. 37a-41a, *infra*).

JURISDICTION

The opinion of the court of appeals was filed on March 15, 1988. Timely petitions for rehearing and for rehearing *in banc* were filed by all three defendants. The petitions for rehearing were denied, with one judge dissenting, and

the petitions for rehearing *in banc* were denied, with five active Circuit Judges dissenting, on April 19, 1988. Appendix IV, pp. 42a-43a, *infra*. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATEMENT

1. *The Display*

For many years, the City of Pittsburgh has erected a seasonal display on the steps of the City-County Building (App. 284a, 436a).[1] The display contains a 45-foot-high Christmas tree, Christmas-tree lights and ornaments, and a nine-branched candelabrum or "menorah" that is 18 feet high (App. 249a-250a).[2] The Christmas tree stands on a platform, to which is attached a large sign that reads as follows (App. 426a-427a):

SALUTE TO LIBERTY

DURING THIS HOLIDAY SEASON, THE CITY OF PITTSBURGH SALUTES LIBERTY. LET THESE FESTIVE LIGHTS REMIND US THAT WE ARE THE KEEPERS OF THE FLAME OF LIBERTY AND OUR LEGACY OF FREEDOM

RICHARD S. CALIGUIRI, MAYOR

[1] "App." refers to the Joint Appendix filed in the court of appeals.

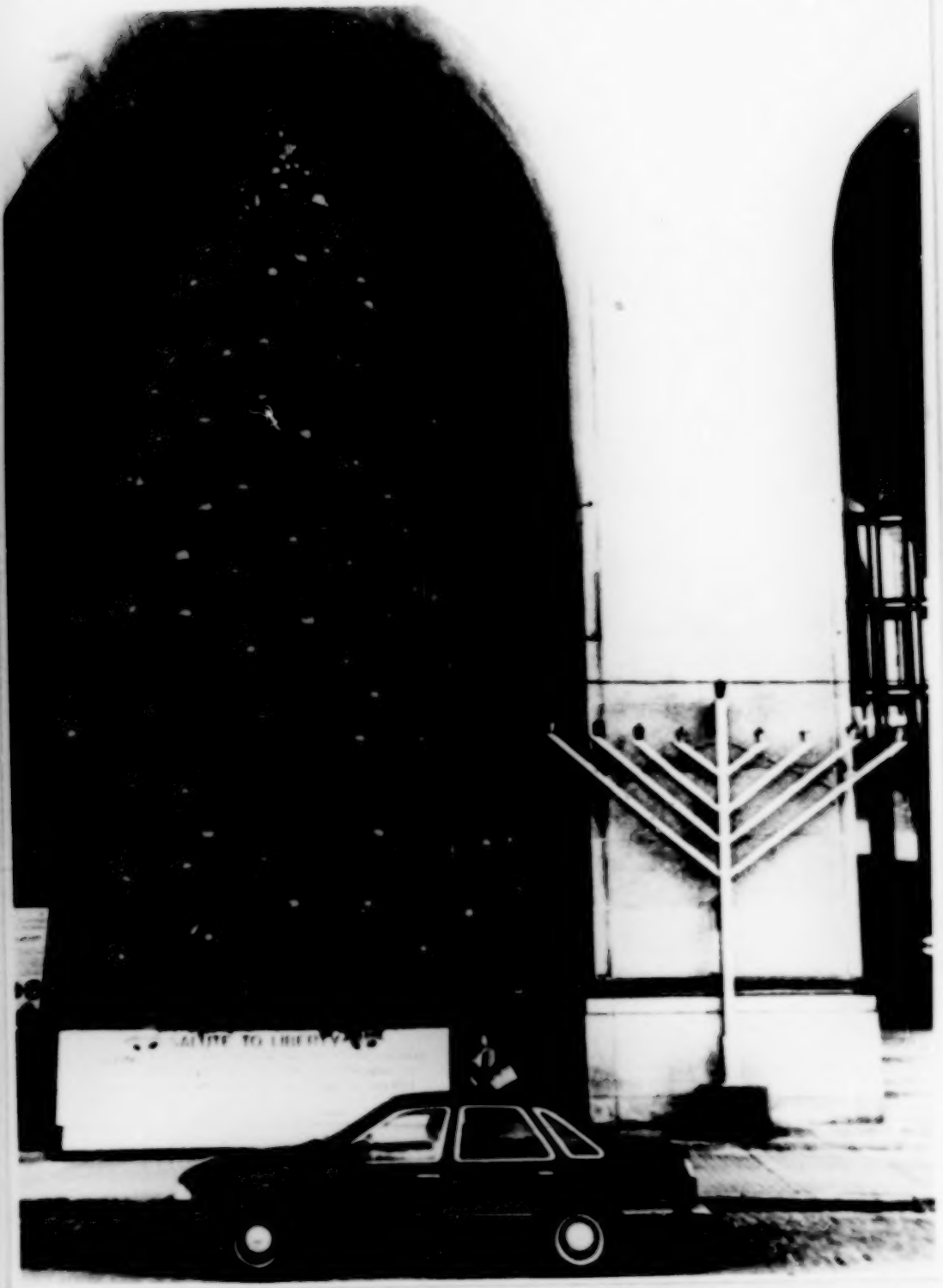
[2] The plaintiffs instituted this action against two local governments that participated in totally separate seasonal displays. Allegheny County was responsible for the erection of a creche on the first floor of the County Courthouse. That nativity scene has been erected since 1981 in the building that is under the county's authority. Wholly discrete is Pittsburgh's seasonal display that features a huge Christmas tree on the front steps of the City-County Building, which is one block away from the County Courthouse. The plaintiffs did not challenge the constitutionality of the Christmas tree or any of its accoutrements. It challenged only the addition of the Chanukah menorah to the display. Apart from the fact that the plaintiffs joined the county and the city in a single complaint and challenged both displays in a single lawsuit, there is no connection or other relationship between the two displays.

A photograph of the scene, which is Intervenor Exhibit 1 in the record (App. 426a), appears on the following page of this brief.

The menorah is owned by Chabad, a private Jewish organization, and has been provided to the city, free of charge, for inclusion in its seasonal display (App. 357a). The entire display, including the tree, its ornaments, the platform, the sign, and the menorah, is put in place each year by city employees. The usual procedure is that the platform is constructed first and the Christmas tree is placed on the platform several days thereafter (App. 281a-282a). The "lifter" used for the tree is also used, at the same time, to move the menorah to its proper location (App. 282a). It takes approximately one hour to put up the menorah (App. 282a-283a). The menorah is removed when the remainder of the display is removed (App. 283a). It is stored between seasons on city property (App. 287a). The district court found that the added expense to the City of displaying the menorah is minimal (App. 437a).

2. *The Menorah*

At issue is a candelabrum that, according to the testimony of experts introduced in the district court, has a cultural, universal and religious significance. A candelabrum of this kind is used as part of the Jewish festival of Chanukah, which is an eight-day holiday celebrating a Jewish victory for religious and political freedom in Israel over the Seleucid Empire approximately 2,150 years ago (App. 175a, 292a). Following the victory, the Jewish community found enough oil to burn in the Temple's seven-branched candelabrum for only one day. The Talmud describes that the oil burned, instead, for eight days. Hence the Chanukah candelabrum has eight branches, with a ninth or "service" branch at the center (App. 176a).



A menorah is also used in Jewish homes for the ceremony of lighting Chanukah candles. The menorah itself has no inherent religious significance (App. 301a-302a, 378a). It is not a holy object. It can be made from bottle caps or pieces of tin (App. 302a). It may be discarded after being used and, at other times of the year, may be used for non-religious purposes such as to light a room (App. 301a, 304a). By contrast, Jewish ritual law prescribes what may be done with inherently religious objects. For instance, a Torah scroll, containing the Five Books of Moses, must be buried in a special manner when it is no longer usable. Many other rules pertain to its usage in deference to its sanctity (App. 301a-302a).[3]

In addition to conveying a historical message regarding the above events, the menorah is a political symbol. Many secular Jewish groups also use the menorah as a symbol (App. 378a-379a). The State of Israel uses a seven-branched menorah as a symbol (App. 378a-379a).

3. *The District Court's Decision*

The district court denied the plaintiffs' request for injunctive relief which sought to bar the City of Pittsburgh from displaying the menorah as part of its seasonal display. The Court found that the menorah, although "much smaller than the Christmas tree" (App. 437a), was part of an overall seasonal display of the City of Pittsburgh containing a Christmas tree, Christ-

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[3] The menorah's association with a religious holiday does not make it a sacred object. Rabbi Yisroel Rosenfeld, Chabad's expert, testified that there are many objects which remind one of the same religious event, but they are not sacred religious symbols (App. 304a-307a). Another symbol used during Chanukah is a "dreidle"—a top bearing Hebrew letters used in a Chanukah game. The Hebrew letters stand for the words "a great miracle happened there" (App. 305a-306a). Potato pancakes are also eaten on Chanukah since they are fried in oil and remind observers of the miracle of the oil in the Temple. Neither the top nor the pancake is a religious symbol (App. 306a-307a).

mas tree ornaments, a "Salute to Liberty" sign and the menorah.

The district court found that the display had a secular purpose, that its effect was not to advance or inhibit religion, and that there was no excessive entanglement of government with religion (App. 439a). The trial judge also found that there was no evidence that the display has caused political division. In reaching this conclusion, the trial judge noted that the expense to the city in displaying the menorah was "minimal and of no consequence" (App. 437a), that the menorah "has no particular religious significance when placed in a public location beyond signifying a 'Light to the World' somewhat like the Christmas message 'Peace on Earth, Goodwill to Men'" (App. 437a), and that there was no evidence that the city was motivated by religious purposes (App. 439a).

4. *The Court of Appeals' Decision*

A divided court of appeals reversed. The majority held that since the menorah was located at a public building "devoted to core functions of government" and "was placed at a prominent site at the public building where visitors would see it," the "only reasonable conclusion" was that by permitting placement of the menorah "the city and county have tacitly endorsed . . . Judaism and have therefore acted to advance religion." 842 F.2d at 662. On this acount, the majority concluded that the "second prong" of the test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), had been violated.

The majority discounted the fact that the menorah was placed near a Christmas tree on the ground that it was not thereby "subsumed by a larger display of non-religious items." *Id.* The majority also acknowledged that the menorah has no inherent religious significance, but it held that "its sectarian character is clear and thus

even though it may not be regarded as a sacred object its placement was an endorsement of religion." 842 F.2d at 662.

Judge Weis dissented. He believed that the constitutionality of the menorah, as well as the creche erected by Allegheny County, was resolved by *Lynch v. Donnelly*, 465 U.S. 668 (1984). 842 F.2d at 666-670. Inclusion of the menorah in the over-all seasonal displays erected by the county and the city, said Judge Weis, "did no more than broaden the commemoration of the holiday season and stress the notion of sharing its joy." 842 F.2d at 671. He concluded, "By marking the Judeo-Christian aspects of the holiday season, the local governments appropriately called attention to the great pluralism that is the hallmark of religious tolerance in this country." *Id.*

Five active Circuit Judges voted to grant rehearing *in banc*. The petitions for rehearing and for rehearing *in banc* were, however, denied by a majority of the court of appeals.

REASONS FOR GRANTING THE WRIT

The City of Pittsburgh long maintained a seasonal city display that expressed only the message of a Christian holiday—Christmas. Beginning several years ago, the city permitted a Jewish group to add to the city display a separate symbol that brings to mind, among other concepts, the Jewish holiday of Chanukah, generally celebrated at the same time of the year as Christmas.

A majority of the court of appeals has now held that this modification of the city's seasonal display is unconstitutional on the ground that the added symbol (but not the Christmas tree) "was an endorsement of religion." 842 F.2d at 662. When considered in its full context, the added symbol—a menorah—does not constitute official "religious endorsement" at all. Indeed, the menorah's principal effect is to mitigate the one-sided official encouragement or appearance of official endorsement con-

veyed by a large Christmas tree on the steps of the city's central public building. Rather than "endorsing" a single faith, the menorah placed adjacent to the Christmas tree tells Pittsburgh's residents that the City is neutral on questions of religion—that all faiths may be represented in a city-maintained seasonal display.

I. THE COURT OF APPEALS' DECISION MISAPPREHENDS AND MISAPPLIES THE VIEWS OF ALL THIS COURT'S JUSTICES IN *LYNCH v. DONNELLY*

The reported opinions in *Lynch v. Donnelly*, 465 U.S. 668 (1984), and in the lower-court cases that have followed and interpreted *Lynch* have acknowledged that the constitutionality of a public religious display relates to whether the display "is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message." 465 U.S. at 680. The concern expressed by the dissenters in *Lynch* (as defined in the majority opinion) was that "observers may perceive that the city has aligned itself with the Christian faith by including a Christian symbol in its display." 465 U.S. at 683. Justice Brennan's dissenting opinion stated explicitly that the constitutional defect in the *Lynch* display was that the publicly displayed creche "amounts to an impermissible governmental endorsement of a *particular faith*." 465 U.S. at 695 (emphasis added). *See also* 465 U.S. at 701 ("government's imprimatur of approval on the *particular* religious beliefs exemplified by the creche") (emphasis added).

Terms like "advocacy," "alignment," "endorsement," and "imprimatur of approval" are appropriate when a single faith is selected for favored governmental treatment. In *Lynch* and the cases that have followed it, the central issue was whether Christianity was impermissibly endorsed by a government-sanctioned display that gave no recognition to any other faith. The majority in

Lynch acknowledged that the creche challenged in that case was a benefit to the Christian faith, but the majority concluded that this advantage was "indirect, remote, and incidental." 465 U.S. at 683. The dissenters, on the other hand, emphasized "our remarkable and precious religious diversity" (465 U.S. at 697), and found that the city's seeming endorsement of the creche constituted "religious chauvinism" that "singled out Christianity for special treatment" (465 U.S. at 701-702) and "convey[ed] the message" that the views of minority religious groups "are not similarly worthy of public recognition nor entitled to public support" (465 (U.S. at 701) (footnote omitted)).

These considerations—determinative of the outcome in *Lynch*—are absent when the issue is whether a Jewish symbol may be *added* to an otherwise unchallenged Christian display. The City of Pittsburgh did not "align itself" with Judaism or give it a governmental "imprimatur of approval" by permitting an 18-foot-high menorah to be placed next to a 45-foot-high Christmas tree. No one could maintain, in these circumstances, that Judaism was granted "special treatment" or was the beneficiary of "religious chauvinism."

Indeed, the presence of the menorah beside the huge Christmas tree symbolizes precisely the "remarkable and precious religious diversity" that the dissenters in *Lynch* sought to preserve. Rather than amounting to "governmental favoritism toward one set of religious beliefs" (465 U.S. at 714), the placement of a menorah adjacent to a Christmas tree recognizes "the religious beliefs and practices of the American people as an aspect of our national history and culture" (465 U.S. at 716). It is surely not what the dissenters in *Lynch* believed the creche to be—"a coercive, though perhaps small, step toward establishing the sectarian preferences of the majority at the expense of the minority" (465 U.S. at 725). No one can claim that the faith identified with the menorah is the "majority" or that its presence on the steps of the City-

County Building, immediately adjacent to the Christmas tree, is in any manner "coercive."

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S DECISION IN *LARSON v. VALENTE*

This Court held in *Larson v. Valente*, 456 U.S. 228, 244 (1982), that "one religious denomination cannot be officially preferred over another." By overruling the City of Pittsburgh's effort to be even-handed in granting religious faiths access to its official seasonal display, the majority of the court of appeals has forced the city to give preference to Christianity over Judaism. That result violates the clear "constitutional prohibition of denominational preferences" that this Court enforced in *Larson v. Valente*, *supra* at 245.

Pittsburgh's mammoth Christmas tree plainly commemorates the seasonal holiday of Christianity, the faith professed by the majority of its citizens. Having opened the steps of the City-County Building to the various Christian denominations that celebrate Christmas and view the tree and its lights as an integral part of that celebration, the city was constitutionally obliged to grant equal access to minority faiths such as Judaism. *See, e.g.*, the dissenting opinion of Judge Arnold in *Lubavitch of Iowa, Inc. v. Walters*, 808 F.2d 656, 657 (8th Cir. 1986), which we quote here in full:

> A Christmas tree owned by the State of Iowa has been erected in the rotunda of the state capitol. Another Christmas tree, also owned by the state, has been erected on the capitol grounds. The ornaments on the tree in the rotunda of the state capitol include angels. The state is obligated to treat all religious evenhandedly. Allowing the placement of these Christmas trees, while at the same time denying permission for the Menorah, appears to be a discrimination against the Jewish religion. So long as Christmas symbols are permitted, other religions should be given equal treatment.
>
> I would therefore grant the relief sought by plaintiffs-appellants, leaving, however, to the state the option of removing any unattended Christmas trees from the state capitol and its grounds, in which event the state would be free not to allow an unattended Menorah on the capitol grounds.

III. THE CONSTITUTIONAL ISSUES ARE IMPORTANT AND AFFECT MANY JURISDICTIONS

There are now four Circuits that have ruled on the constitutionality of sectarian holiday displays since the Court's decision in *Lynch v. Donnelly*, 465 U.S. 668 (1984). The majority below acknowledged that the three appellate decisions preceding this ruling have taken different approaches. 842 F.2d at 660-661. Compare *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided court*, 471 U.S. 83 (1985), with *American Civil Liberties Union v. Birmingham*, 791 F.2d 1561 (6th Cir.), *cert. denied*, 107 S. Ct. 421 (1986); and *American Jewish Congress v. Chicago*, 827 F.2d 120 (7th Cir. 1987). There are dozens, if not hundreds, of local jurisdictions whose holiday displays in 1988 and 1989 will depend on which of the various approaches to the fundamental constitutional issue is ultimately deemed to be correct.

Even if the Court were disinclined to consider again the constitutionality of creches on public property, a substantial number of recent cases arise from efforts of various local Jewish groups to supply menorahs in order to balance the overwhelmingly Christian message delivered by municipal displays that feature Christmas trees and other symbols associated exclusively with the Christian holiday. *See, e.g., Lubavitch of Iowa, Inc. v. Walters*, S.D. Iowa, No. 86-901-13, *aff'd*, 808 F.2d 656 (8th Cir. 1986); *Kalamson v. City of Cincinnati*, S.D. Ohio, Civ.

No. C-1-87-101; *Chabad Lubavitch of Manasota, Inc. v. City of Sarasota*, M.D. Fla., No. 87-1808; *Okrand v. Wilkins*, Superior Ct. for Los Angeles County, Case No. C577925 (*see* Appendix V, pp. 44a-46a, *infra*). The constitutionality of these efforts to provide religious neutrality and instill a feeling of equality in American citizens of minority faiths should not be finally resolved by the happenstance that the question has first arisen in a federal court of appeals in a case in which the plaintiffs also sued to enjoin erection of a nativity scene. The Court may grant this petition for certiorari to resolve the important constitutional questions raised by the presence of a menorah adjacent to a publicly sponsored Christmas tree and need not, at the same time, re-visit issues discussed in *Lynch v. Donnelly*, *supra*.

CONCLUSION

For the foregoing reasons, Chabad's petition for a writ of certiorari should be granted.

Respectfully submitted,

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JULY 1988

APPENDICES

APPENDIX I

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

Nos. 87-3395, 87-3436

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania

CHABAD,

Intervenor

AMERICAN CIVIL LIBERTIES UNION,
GREATER PITTSBURGH CHAPTER,
ELLEN DOYLE, MICHAEL ANTOL,
REVEREND WENDY L. COLBY,
HOWARD ELBLING, HILARY
SPATZ LEVINE, MAX A. LEVINE,

Appellants No. 87-3395

MALIK TUNADOR,

Appellant No. 87-3436

On Appeal from the United States District
Court for the Western District
of Pennsylvania
D.C. Civil No. 86-2617

Argued Jan. 20, 1988
Decided March 15, 1988
As Amended April 7, 1988
Rehearing and Rehearing In Banc
Denied April 19, 1988

Before GIBBONS, Chief Judge, and WEIS and GREENBERG, Circuit Judges.

OPINION OF THE COURT

GREENBERG, Circuit Judge.

This action was commenced on December 10, 1986 by plaintiffs American Civil Liberties Union, Greater Pittsburgh Chapter, and certain individuals against Allegheny County and the City of Pittsburgh, political subdivisions of the Commonwealth of Pennsylvania. In general, plaintiffs alleged that the county had unlawfully permitted the erection of a creche or nativity scene depiciting the birth of Jesus Christ inside the main entrance of the Allegheny County Courthouse and the city was about unlawfully to permit the erection of a menorah, a nine-branched candelabrum used by Jews as part of the religious celebration of Chanukah, on the steps of the main entrance of the City-County Building jointly owned and operated by defendants. It was asserted that the expenditure of public funds and the display of the religious symbols violated the Establishment Clause of the First Amendment of the United States Constitution applicable to the states under the Fourteenth Amendment, thus giving rise to a cause of action under 42 U.S.C. § 1983. Plaintiffs sought declaratory and injunctive relief as well as nominal damages and attorneys' fees.

Following an evidentiary hearing on December 15, 1986, the court in an oral opinion made findings and denied a preliminary injunction. Thereafter, Chabad, the Jewish organization which owns the menorah, was permitted to intervene and present additional evidence. On May 8, 1987 the district judge issued a memorandum opinion incorporating his prior oral findings and adding findings regarding the menorah. On that day the court entered an order denying the application for an injunction and on May 29, 1987 it entered a final judg-

ment in favor of the defendants judgment denying and this appeal followed.

The facts in this case are simple and essentially undisputed. Annually since 1981 the county has permitted the display of a creche enclosed by a fence on the grand staircase of the first floor of the county courthouse. The creche consists of traditional figures ranging in height from three to 15 inches, including a wooden stable with the infant Jesus, the Virgin Mary, Joseph, the Three Wise Men, shepherds, various animals and an angel holding a banner reading "Gloria in Excelsis Deo" ("Glory to God in the Highest"). The creche, though stored in the basement of the courthouse, is the property of the Holy Name Society of the Diocese of Pittsburgh, a Catholic men's organization and thus a sign in front of it recites: "This display donated by the Holy Name Society." Though it is erected, arranged and disassembled each year by the moderator of the Holy Name Society, the county supplies a dolly and minimal aid to transport it to and from the courthouse basement. While the county provides no special security or illumination for the display, its Bureau of Cultural Programs decorates the creche with red and white poinsettia plants and evergreen trees purchased at public expense. The county also displays wreaths purchased through county funds. Other decorations such as trees, Santa Clauses and additional wreaths are displayed by various departments and offices throughout the courthouse building.

The creche is displayed for about six weeks from late November to early January. During the weeks prior to Christmas the county sponsors Christmas carol programs on the first floor of the courthouse with the chorale groups using the creche for a foreground. The choirs, typically high school students, sing popular songs and religious and secular Christmas carols. The caroling is broadcast by loudspeakers to the public in the courthouse. The programs are dedicated to the universal themes of

world peace and brotherhood and to the memory of persons missing in action in the Vietnam War. The grand staircase and the surrounding area are used throughout the year for art displays and other civic and cultural events and programs.

The courthouse houses the principal offices of the county, including those of its governing officers, the county commissioners, and the treasurer and controller, as well as the criminal and some civil courts of Allegheny County. In view of the creche's location, it is probably seen by many visitors to the courthouse including taxpayers, lawyers trying cases or serving as arbitrators, litigants, persons desiring to search certain court records and people with business at the sheriff's office.

The City-County Building, the site of the menorah, is one block from the courthouse. The various public offices in the building include those of the city treasurer, county prothonotary, marriage license bureau and the register of wills. In addition, certain courts sit in the building. Although the building bears the name of both political subdivisions, the menorah is placed in an area maintained solely by the city. For a number of years during the Christmas season the city has installed a 45 foot Christmas tree on a platform on the front steps of the main entrance of the building and next to the tree on the steps of the main entrance to the building since 1982 the city has annually erected an approximately 18 foot high menorah. The menorah, which was purchased by Chabad, is put in place at the time of the Jewish celebration of Chanukah. In front of the tree a sign bearing the mayor's name has been erected. It recites:

SALUTE TO LIBERTY

> During this holiday season, the City of Pittsburgh salutes liberty. Let these festive lights remind us

> that we are the keepers of the flame of liberty and our legacy of freedom.

The display, which includes the tree and its ornaments, the platform, the sign and the menorah, is installed by city employees. In addition, the City has placed signs advertising a charity fund drive and a seasonal celebration of a flower display in front of the building.

In the district judge's oral opinion, he indicated that the case was controlled by the Supreme Court's decision in *Lynch v. Donnelly*, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984). He found that neither the display of the creche nor the menorah conveyed a message of governmental enforcement of religion. He noted:

> . . . none of the people who enter the Courthouse are required to do anything; they are not required to read, or to sing, or to pause or to reflect. Neither are people required to pause or look or read or make any gestures where the menorah is concerned; they are merely displays.

While he did not doubt the sincerity of witnesses who testified that the creche offended some visitors to the courthouse, he pointed out that "the Governments of the United States, Local and State and Federal do many things that are offensive to many people, and . . . mere offense is not sufficient to impel the Court to issue an injunction." He continued: "There must be more substantial injury than mere offense that is felt inwardly. But it is not felt because one must read, or sing, or talk, or pause, or do something affirmatively." The judge concluded:

> The mere displays, therefore are found to be de minimis in the context of the First Amendment. I don't think there's any danger whatever that they will establish any religion. I don't think the County Commissioners or the Mayor and the City intend to affect anyone's religion, or even offend anyone. On

> the contrary, I think the intention was to celebrate the holiday seasons, and I doubt that the County or City officials paused to think that they were offending anyone. So, therefore, I just do not see very much chance of the plaintiffs succeeding on the merits. I don't think that there has really been any appreciable harm. I don't think that the mere reference to religion is actionable.

In his subsequent memorandum opinion the judge wrote:

> The Chanukah menorah has no particular religious significance when placed in a public location beyond signifying a 'Light to the World' somewhat like the Christmas message 'Peace on Earth, Goodwill to Men.'
>
> Chabad advocates the display of Chanukah menorahs in public and private places during the holiday season all over the county to symbolize the lighting of the souls of the Jewish people, i.e., to call on them to go forth and accomplish good and overcome evil.
> . . . .
>
> The expense to the city [in the erecting and storing the menorah] is minimal and of no consequence. I fail to see how the display of the menorah violates the establishment clause. It may call to the attention of the public that Jews also have a miracle to remember. Certainly the local governments should not be enjoined from allowing both faiths to call attention to the miracles which enrich their histories, either the virgin birth or the burning of one day's oil for many days while the Jews sought to recapture their temple, so long as the symbols are part of a holiday season display. I should think the joint displays [send] a message that in Pittsburgh the faiths harmonize and both seek to send some light to the world at the holidays. I cannot conceive that court should forbid such a thing or declare it illegal.

In a footnote to his opinion he explained that:

> Chanukah celebrates the recapture of the temple in Jerusalem from the Syrian Greeks in 165 B.C.E. The miracle, we understand, to be the continuous light emanating for several days from but one day's supply of oil.

We are in agreement with the trial judge that the starting point of our analysis should be *Lynch v. Donnelly*. There residents of Pawtucket, Rhode Island, and the Rhode Island affiliate of the American Civil Liberties Union brought an action challenging the city's inclusion of a creche in its annual Christmas display erected in cooperation with the downtown retail merchants' association in a park owned by a non-profit organization located in the heart of the shopping district. In addition to the creche, the display included many of the figures and decorations traditionally associated with Christmas, such as a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant and a teddy bear, hundreds of colored lights and a large banner that read "Seasons Greetings." The creche, which had been included in the display for 40 or more years, consisted of the traditional figures, all ranging in height from five inches to five feet. When acquired, it cost the city $1,365 and at the time of the suit was valued at $200. The erection and dismantling of the creche cost the city about $20 per year and, though there were nominal expenses for its lighting, no money had been spent for its maintenance for the ten years preceding the suit. The district court held that the city's inclusion of the creche in the display violated the Establishment Clause and the Court of Appeals for the First Circuit affirmed. *Donnelly v. Lynch*, 525 F.Supp. 1150 (D.R.I.1981), *aff'd*, 691 F.2d 1029 (1st Cir.1982).

A sharply divided Supreme Court reversed. For the majority, Chief Justice Burger pointed out that in a First Amendment Establishment Clause case, the Court must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or state upon the other, but that total separation of the two is not possible and is not required. *Lynch v. Donnelly*, 465 U.S. at 672-73, 104 S.Ct. at 1358-59. He then demonstrated that religion has long entered into governmental functions and thus the Supreme Court has uniformly rejected an absolutist approach in applying the Establishment Clause and instead has "scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith or tends to do so." 465 U.S. at 678, 104 S.Ct. at 1361-62.

Chief Justice Burger indicated that: "In each case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed." 465 U.S. at 678, 104 S.Ct. at 1362. He observed that while the Court has often in Establishment Clause cases used the three-prong *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971), test of whether the conduct questioned has a secular purpose, whether its principal or primary effect is to advance or inhibit religion and whether it creates an excessive entanglement of government with religion, it has "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area." 465 U.S. at 679, 104 S.Ct. at 1362. Thus he stated that in two cases subsequent to *Lemon*, *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), and *Larson v. Valente*, 456 U.S. 228, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982), the Court had not applied the *Lemon* test. Chief Justice Burger then indicated that the focus of the Court's inquiry should be on the creche in the context of the Christmas season. He wrote that there was a secular purpose for the display and the evidence did not establish the inclusion of the creche in the display was a purposeful or surreptitious

effort to express some subtle advocacy of a particular religious message. 465 U.S. at 680, 104 S.Ct. at 1363.

The Chief Justice rejected the district court's finding that the primary effect of including the creche was to confer a substantial and impermissible benefit on religion in general and on the Christian faith in particular as he considered that the benefits conferred were "indirect, remote, and incidental" when compared to other governmental action upheld by the Court. 465 U.S. at 681-82, 104 S.Ct. at 1363-64. He noted that while it could be argued that the display of the creche showed an alignment of the government with Christianity, the benefit to religion was "no more an advancement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as 'Christ's Mass,' or the exhibition of literally hundreds of religious paintings in governmentally supported museums." 465 U.S. at 683, 104 S.Ct. at 1364. Finally, the Court found that the third prong of the *Lemon* test, whether the conduct creates an excessive entanglement of government with religion, had not been violated as there had been no appreciable administrative entanglement between religion and state resulting from the city's ownership and use of the creche.

Though a decision of great significance, *Lynch v. Donnelly* has by no means put to rest issues involving use of religious decorations at the Christmas season nor has it foreshadowed any abandonment of the *Lemon* test which the Supreme Court continues to employ. *See Edwards v. Aguillard*, —— U.S. ——, ——, 107 S.Ct. 2573, 2576-78, 96 L.Ed.2d 510 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 55-61, 105 S.Ct. 2479, 2489-90, 86 L.Ed.2d 29 (1985). Indeed, probably because the opinion was tied so closely to the facts involved and because of the nature of the issues, there has been considerable post-*Lynch* litigation with the judges as well as the litigants at odds. Of these post-*Lynch* cases, we find two decisions

by divided courts particularly helpful, *American Jewish Congress v. City of Chicago*, 827 F.2d 120 (7th Cir. 1987), and *American Civil Liberties Union v. City of Birmingham*, 791 F.2d 1561 (6th Cir.), *cert. denied*, —— U.S. ——, 107 S.Ct. 421, 93 L.Ed.2d 371(1986).

In *American Jewish Congress v. City of Chicago*, the Court of Appeals for the Seventh Circuit dealt with a privately constructed and owned creche displayed in the lobby of the Chicago City-County Building during the holiday season. While the creche had been donated to the city, after earlier litigation it was reconveyed to the donor. 827 F.2d at 123. The creche was displayed at a prominent part of the building but the display included signs disclaiming any endorsement by the city. *Ibid.* A nominal amount of public funds was expended to illuminate the scene and the city maintained other Christmas decorations within the building including wreaths, a Christmas tree, a mechanical Santa Claus with reindeer and a snowman. 827 F.2d at 122.

The Court of Appeals held that the *Chicago* creche was a self-contained unit set apart from secular objects and thus differed from that in *Lynch v. Donnelly*. 827 F.2d at 125. Even more significant, however, was the circumstance that unlike that in *Lynch v. Donnelly* the creche in *Chicago* was placed at the official headquarters of the government and not in a private park. 827 F.2d at 126. The court concluded that the creche was "an unequivocal Christian symbol," 827 F.2d at 127, so that its placement in this "unique physical context" communicated a message of government endorsement which violated the second prong of the *Lemon* test. 827 F.2d at 128. It explained:

> The presence of a government in Chicago's City Hall is unavoidable. The building is devoted to government functions: for example, both city and county government offices are located there, and the City Council holds its meetings there. Because City Hall is so plainly under government ownership and control, every display and activity in the building is implicitly marked with the stamp of government approval. The presence of a nativity scene in the lobby, therefore, inevitably creates a clear and strong impression that the local government tacitly endorse Christianity.
>
> The message of endorsement is equally powerful on the symbolic level. Like the nativity scene itself, City Hall is a symbol—a symbol of government power. The very phrase 'City Hall' is commonly used as a metaphor for government. *A creche in City Hall thus brings together Church and State in a manner that unmistakably suggests their alliance.* The display at issue in this case advanced religion by sending a message to the people of Chicago that the city approved of Christianity.
>
> The city has attempted to mitigate the impact of this message by posting six disclaimer signs on the display, two on each side, and two on the front. However, the message of government endorsement generated by this display was too pervasive to be mitigated by the presence of disclaimers. As the district court correctly noted, 'a disclaimer of the obvious is of no significant effect.' *American Jewish Congress v. Chicago*, No. 85 C 9471 at 14 (N.D.Ill. Nov 5, 1986).
>
> ' "Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement . . . a core purpose of the Establishment Clause is violated." ' *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 389, 105 S.Ct. 3216, 3226, 87 L.Ed.2d 267 (1985). The government-approved placement of the nativity scene

> in Chicago's City Hall unavoidably fostered the inappropriate identification of the City of Chicago with Christianity, and therefore violated the Establishment Clause. [827 F.2d at 128 (footnotes omitted, emphasis added).]

In *American Civil Liberties Union v. City of Birmingham* the Court of Appeals for the Sixth Circuit addressed the constitutionality of a city-owned creche built, stored and maintained at public expense and placed on the front lawn of the city hall. The court held that the placement of the creche violated the Establishment Clause as it conveyed the message that the city endorsed Christianity. It noted that the display called attention solely to the religious origin of the Christmas holiday season as it was not a portion of a large display including a "multitude of secular symbols." 791 F.2d at 1566.

A different approach than that in the *Chicago* and *Birmingham* cases was taken by another court in *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), *aff'd without opinion by an equally divided Court*, 471 U.S. 83, 105 S.Ct. 1859, 85 L.Ed.2d 63 (1985). There the municipality refused a group's request to be permitted to place a privately-owned creche in a municipal park in the center of the business district. The Court of Appeals for the Second Circuit considered the case from the viewpoint of protecting the applicant's First Amendment rights and thus was concerned with whether the exclusion was necessary to serve a compelling public interest. 739 F.2d at 723. The court held that it was not as the placement of the display would not violate the *Lemon* test. However, the matter was remanded so that an order could be entered requiring a more prominent sign disclaiming a public interest in the display.

In other cases the courts have addressed the constitutionality of the Christian cross and have recognized that the cross is a symbol of Christianity and that it is thus not only religious but also a symbol of a particular religious sect. Consequently, these courts have concluded that because a cross is more than simply a symbol of Christmas, *i.e.*, because it possesses this independent religious significance, its placement on public buildings is an endorsement of religion. *See, e.g., American Civil Liberties Union v. City of St. Charles*, 794 F.2d 265 (7th Cir.), *cert. denied*, —— U.S. ——, 107 S.Ct. 458, 93 L.Ed.2d 403 (1986); *Libin v. Town of Greenwich*, 625 F.Supp. 393 (D.Conn.1985). While there seems to be little reported litigation involving menorahs, in *Lubavitch of Iowa, Inc. v. Walters*, 808 F.2d 656 (8th Cir. 1986), it appears that the Court of Appeals affirmed the district court's denial of a preliminary injunction sought by the plaintiffs to compel a state official to allow a menorah to be placed on public grounds where a Christmas tree was displayed.

From our consideration of the foregoing cases and others, we have concluded that the second prong of the *Lemon* test is that most readily violated as a public entity usually is able to articulate some secular purpose for a display (first prong) and the mere placement and storage of a display will involve little entanglement (third prong) of government and religion. *See American Civil Liberties Union v. City of Birmingham*, 791 F.2d at 1565-66. On the other hand the use of a religious symbol in a display on public property or by a public entity may well be deemed an endorsement of religion regardless of an entity's stated reasons for its placement and thereby implicate the second *Lemon* prong as the impact of the display must be judged objectively. The variables that a court should consider in determining whether a display has the effect of advancing or endorsing religion include: (1) the location of the display; (2) whether the display is part of a larger configuration including nonreligious items; (3) the religious intensity of the display; (4) whether the display is shown in connection with a general secular holiday; (5) the degree of public participation in the ownership and maintenance of the display; and (6)

the existence of disclaimers of public sponsorship of the display.

Application of the foregoing principles here leads inexorably to the conclusion that the district judge's determination that the second prong of the *Lemon* test was not violated was incorrect and cannot stand with respect to both the creche and the menorah whether we consider his findings to be matters of law or fact. *See United States v. Adams*, 759 F.2d 1099, 1106 (3d Cir.1985), *cert. denied*, 474 U.S. 906, 971, 106 S.Ct. 275, 336, 88 L.Ed.2d 236 (1985); *Lame v. United States Dep't of Justice*, 767 F.2d 66, 69-70 (3d Cir.1985). Each display was located at or in a public building devoted to core functions of government and each was placed at a prominent site at the public building where visitors would see it. Further, while the menorah was placed near a Christman tree, neither the creche nor the menorah can reasonably be deemed to have been subsumed by a larger display of non-religious items. In addition, both the creche and the menorah are associated with religious holidays and would be viewed as pertaining to a particular religion. Further, the menorah, unlike the creche, is not associated with a holiday with secular aspects. There is public participation, albeit minimal, in both the storage and placement of the displays. Overall, when the record is evaluated in light of these considerations, the only reasonable conclusion is that by permitting the creche and the menorah to be placed at the buildings the city and county have tacitly endorsed Christianity and Judaism and have therefore acted to advance religion.[1] While we do not doubt that some persons find this laudable, it is impermissible under the second prong of the *Lemon* test and thus violates the Establishment Clause of the First Amendment.

[1] Of course we do not imply that if only a creche or only a menorah had been involved our result would have been different. Quite to the contrary we would have reached the same result if only one of the displays had been placed by defendants or either of them.

We recognize, of course, that there is a sign near the creche indicating that the display is a donation of the Holy Name Society. That factor, however, cannot possibly outweigh the considerations which lead us to find that placement of the creche violated the second prong of the *Lemon* test.

In reaching our result, we have not overlooked the argument by Chabad in its brief that a menorah has "no inherent religious significance," unlike certain other objects such as a Torah scroll which contains the five books of Moses. While this distinction is not totally without significance, Chabad admits that the menorah is associated with Chanukah, a religious holiday. Further, we cannot believe that the general public would be aware of the religious fine point made by Chabad and thus view the display of the menorah as a lesser endorsement of religion than that of a Torah scroll or other object regarded as sacred. In any event regardless of the lack of religious significance of a menorah its sectarian character is clear and thus even though it may not be regarded as a sacred object its placement was an endorsement of religion.

Further, we have not ignored the finding by the district judge that the city and county have permitted the faiths to call attention to the miracles enriching their histories. This is undoubtedly so but is exactly what the governments involved here had no lawful right to do. It is clear that in reality the judge was concluding that the governments had endorsed and advanced religion in a fashion barred by *Lemon* and not authorized by *Lynch v. Donnelly*. It is not the function of government to assist religions in explaining their ideologies.

In stating our result, we emphasize that we are not here dealing with purely secular objects. Nor are we concerned with the use of religious objects in a museum or as educational instruments in a classroom, in which circumstances the objects could be presented neutrally. Thus,

it could not reasonably be believed that the school authorities were endorsing a religion if they included a display of a creche or a menorah as a demonstration of religious objects in a history course. Similarly, a display of religious paintings in a public museum merely reflects an appreciation of the artistic value of the objects. Here, however, the effect was different as it is evident that the religious displays of the city and county have the effect of endorsing the messages reflected by the displays. This is unconstitutional.

In view of our result we need not consider whether either the first or third prong of the *Lemon* test has been violated. The order of May 8, 1988 and the judgment of May 29, 1988 will be reversed and this matter will be remanded to the district court for further proceedings consistent with this opinion.

WEIS, Circuit Judge, dissenting.

It is unfortunate that plaintiffs have succeeded in stifling governmental commemoration of two miracles which occurred about one hundred-fifty years apart in time, but so few miles in distance—and muffling the message of peace and understanding that pervades the joint observance. This aggressive "neutrality" is contrary to the spirit of religious liberty embodied in the First Amendment and will lead not to accommodation but to animosity, not to tolerance of, but hostility toward, religion.

I.

The jurisprudence of the Establishment Clause, by far the more litigated of the two religion guarantees of the First Amendment, ranks high in confusion, inconsistency, and emotional fervor. It has provoked an enduring and highly spirited debate. At one extreme of the controversy are those who advocate an absolutist separation between religion and state, a quarantining of one from the other that verges on governmental enmity toward religion. At

the other end of the debate are those who find no constitutional impropriety in governmental activity that aids all creeds equally and without discrimination.

The Supreme Court's teachings in this area have become mired between these two competing positions, each view at different times and on different issues commanding a narrow majority in the Court and emerging as the law of the land, often just temporarily. As a result, the Court's Establishment Clause decisions map out only a wavering, uncertain course of what is permissible governmental activity. Illustrative cases demonstrate the breadth of the controversy and the inconsistent results.

Absolutists would condemn all forms of government financial aid to religion. *See Zorach v. Clauson*, 343 U.S. 306, 318, 72 S.Ct. 679, 686, 96 L.Ed. 954 (1952) (Black, J., dissenting) ("In considering whether a state has entered this forbidden field the question is not whether it has entered too far but whether it has entered at all.") However, the Court has found no constitutional violation in the longstanding government practices of providing tax exemptions to religious institutions, *Walz v. Tax Comm'n*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970); federal grants for constructing college buildings at church-sponsored universities, *Tilton v. Richardson*, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971); and vocational assistance to finance a blind person's training at a Christian college to become a pastor, missionary, or youth director, *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986), although each of these programs conferred a measurable financial benefit on religion.

Similarly, the Court has ruled that a state legislature did not violate the Establishment Clause by engaging a chaplain to open each legislative session with a prayer, *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983); or by enacting a statute prohibiting all commercial activity on Sunday, *McGowan v. Mary-*

land, 366 U.S. 420, 81 S.Ct. 1011, 6 L.Ed.2d 393 (1961). Nevertheless, a statute directing the posting of a privately-purchased copy of the Ten Commandments in school classrooms was held contrary to the Establishment Clause. *Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980).

Invoked often in cases questioning a state's financial support to parochial schools, the Establishment Clause has yielded contradictory and frequently irrational results. The Court has held that a school district may pay for students' bus transportation to parochial schools, where religion undoubtedly will be taught. *Everson v. Board of Educ.*, 830 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947). But government may not finance bus trips for parochial students to a natural history museum, where religious instruction is highly unlikely. *Wolman v. Walter*, 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977). A state may lend parochial schools textbooks that contain maps of the United States, *Board of Educ. v. Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968), but it may not lend those same schools unbound maps of the United States for use in geography classes, *Meek v. Pittenger*, 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975).

A state may provide supplementary remedial courses in math and reading to parochial school students. *Wolman*, 433 U.S. at 245, 97 S.Ct. at 2604. However, remedial courses taught by visiting public school teachers may not be conducted in parochial school classrooms leased by the state, cleared of religious artifacts, and bearing disclaimer signs. *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985). Numerous similar examples only make the same point. *See* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U.Pitt.L.Rev. 673, 680 (1980). One must reluctantly agree with the Supreme Court's own assessment of its success in this area, that after forty-one years of trying it still "can only dimly

perceive the lines of demarcation." *Witters*, 474 U.S. at 485, 106 S.Ct. at 751.

Commentary by legal scholars parallels the Court's deep ideological divisions. The sheer volume of publications on the subject has reached such proportions that its magnitude alone discourages judicial reference. *See, e.g.*, Fairchild, *Lynch v. Donnelly: The Case For the Creche*, 29 St. Louis U.L.J. 459 (1985); Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on Lynch v. Donnelly*, 1984 Duke L.J. 770, 772 n. 5 (sampling commentary). *See also Religion and the State*, 27 Wm. & Mary L.Rev. 833, 833-1109 (1986) (symposium).

Particularly misleading has been the Court's recurring characterization of the Establishment Clause's objective as erecting a "wall of separation." This metaphor, originally invoked by the Court over a century ago in *Reynolds v. United States*, 98 U.S. (8 Otto) 145, 164, 25 L.Ed. 244 (1879), is ascribed to Thomas Jefferson. In a short note to the Danbury Baptist Association in 1802, he wrote: "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State." *Thomas Jefferson: Writings* 510 (M. Peterson ed. 1984). Jefferson considered the Religion Clauses applicable to the national, but not state, government.

Justice Black later treated this reference as an expression of the Framers' intent, embracing the metaphor as a guiding principle for Religion Clause analysis. In his view, our national religious freedom was conditioned on keeping this "wall" separating church from state "high and impregnable." *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 212, 68 S.Ct. 461, 465, 92 L.Ed. 649 (1948); *Everson*, 330 U.S. at 18, 67 S.Ct. at 513.

As an intepretation of the Framers' intent, the metaphor is quite inaccurate. The author, Thomas Jefferson, was not in the country when the Clause was debated and ratified, nor does his note to the Danbury Baptist Association—written eleven years after the Establishment Clause was added to the Constitution—shed much light on the original drafters' intentions.[1] Though the phrase might have reflected James Madison's views as articulated at the time of his 1785 *Memorial and Remonstrance Against Religious Assessments*,[2] it does not comport with his expressed understanding of the Clause's meaning at the time of its formulation.[3]

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[1] It appears that Jefferson himself did not perceive his "wall" to be so high as to preclude state acknowledgment of religion. Judge Easterbrook cites Jefferson's preamble to his 1779 Virginia Bill for Establishing Religious Freedom: "Well aware . . . that Almighty God hath created the mind free, and manifested his Supreme will that free it shall remain, . . . That all attempts to influence it by temporal punishments . . . are a departure from the plan of the holy author of our religion, who being Lord both of body and mind . . . ." *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 135-36 (7th Cir. 1987) (Easterbrook, J., dissenting). *See also* Crabb, *Religious Symbols, American Traditions and the Constitution*, 1984 B.R.U.L. Rev. 509, 516 & n.31 (Jefferson's Declaration of Independence contains four references to Deity, including: "We hold these truths to be self evident, that all men . . . are endowed by their Creator with certain inalienable Rights . . .").

As President, Jefferson had signed a treaty with the Kaskasia Indians providing for annual federal funding for a Catholic priest for the tribe and placing 12,000 acres of land in trust "for propagating the Gospel among the Heathen." *Wallace v. Jaffree*, 472 U.S. 38, 103 n.5, 105 S.Ct. 2479, 2482 n.5, 86 L.Ed.2d 29 (1985) (Rehnquist, J., dissenting).

[2] Madison's *Memorial and Remonstrance* was appended to Justice Rutledge's dissent in *Everson v. Board of Educ.*, 330 U.S. 1, 63-72, 67 S.Ct. 504, 91 L.Ed. 711 (1947).

[3] Recorded in the Annals of Congress is Madison's understanding of what the new amendment meant:

> "He [Madison] believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought if the word 'national' was introduced [before the word religion], it would point the amendment directly to the object it was intended to prevent."

1 Annals of Cong. 731. This view, that the Establishment Clause was intended only to exclude rivalry among Christian sects, was echoed by Justice Story. *See* 2 J. Story, *Commentaries on the Constitution of the United States* 631-32 (M. Bigelow 5th ed. 1891).

As Judge Easterbrook notes, Madison may in fact have approved of a balancing test approach to the Establishment Clause. While president, Madison had proclaimed national days of fasting and thanksgiving. Though he later "recanted" this "separation heresy," Madison pleaded *de minimis non curat lex*. *City of Chicago*, 827 F.2d at 132 n.2 (Easterbrook, J., dissenting).

More telling is the actual conduct of the First Congress, the body that considered and adopted the Establishment Clause. *See Wallace*, 472 U.S. at 100-03, 105 S.Ct. at 2513-15 (Rehnquist, J., dissenting). The First Congress reenacted the Northwest Ordinance of 1787 (providing that "[r]eligion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged"), *see id.* at 100, 105 S.Ct. at 2513; and implored President Washington to declare a national day of thanksgiving and prayer so that all Americans might join voices "in returning to Almighty God their sincere thanks for the many blessings he had poured down upon them," *see id.* at 101, 105 S.Ct. at 2513. The same week that it approved the Establishment Clause for submission to the states, the First Congress authorized the hiring of legislative chaplains. *Lynch v. Donnelly*, 465 U.S. 668, 674, 104 S.Ct. 1355, 1359, 79 L.Ed.2d 604 (1984).

Thus, the historical evidence is clear that the Framers did not intend the Establishment Clause to erect between religion and state a "wall of separation." In *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), the Supreme Court conceded that its "wall" reference had been an unwise chioce of metaphors. "Judi-

cial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Id.* at 614, 91 S.Ct. at 2112.

Yet, the use of this inaccurate metaphor persists along with its unfortunate semantic overtone implying a preference for state antagonism to, rather than accommodation of, religion in the United States. As I explained in *Public Funds for Public Schools of New Jersey v. Byrne*, 590 F.2d 514, 522 (3d Cir.) (Weis, J., concurring), *aff'd sub nom*, 442 U.S. 907, 99 S.Ct. 2818, 61 L.Ed.2d 273 (1979), I find the encouragement of such a relationship between religion and state undesirable and inconsistent with the Constitution.

Recognizing the lack of a common principle in its Establishment Clause cases, the Supreme Court has attempted to offer some guidance in this sensitive area. The Court most frequently has applied the three-factor formula set out in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). *Lemon* recognized the impossibility of total separation between church and state. "Some relationship between government and religious organizations is inevitable." *Id.* at 614, 91 S.Ct. at 2122. To assess whether that relationship in a specific case has crossed the line of permissibility, the Court examines whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement with religion. *Id* at 612, 91 S.Ct. at 2111.

The *Lemon* approach often has been criticized as inadequate, but has been employed by the Court on most occasions—perhaps only because a better analysis has yet to command a majority. *Cf. Edwards v. Aguillard*, —— U.S. ——, ——, 107 S.Ct. 2573, 2607, 96 L.Ed.2d 510 (1987) (Scalia, J., dissenting) (advocating abandonment

of *Lemon*'s purpose prong); *Wallace*, 472 U.S. at 91, 105 S.Ct. at 2508 (White, J., dissenting) (supporting basic *Lynch*, 465 U.S. at 688-89, 104 S.Ct. at 1367-68 (O'Connor, J., concurring) (suggesting an institutional entanglement/endorsement two-part test to replace *Lemon*).

Nevertheless, the Court repeatedly has refused to accept the three-part *Lemon* analysis as the single, dispositive "test" for evaluating a state's conduct under the Establishment Clause. *See, e.g., Witters*, 474 U.S. at 485, 106 S.Ct. at 751 (Court merely "guided" by *Lemon*); *Ball*, 473 U.S. at 382-83, 105 S.Ct. at 3222 (*Lemon* serves to guide "the general nature of our inquiry"); *Lynch*, 465 U.S. at 679, 104 S.Ct. at 1362 (*Lemon* useful but not always relevant); *Mueller v. Allen*, 463 U.S. 388, 394, 103 S.Ct. 3062, 3066, 77 L.Ed.2d 721 (1983) (*Lemon* provides "no more than a helpful signpost"). On occasion, the Court has refused even to invoke that formula, particularly when the result would be to overturn long-established traditions. *See Lynch*, 465 U.S. at 679, 104 S.Ct. at 1362. Such a departure from *Lemon* is illustrated by *Marsh v. Chambers*, where the Court refused to ban either prayer sessions opening the legislative day or payment to the legislature's chaplain.

With this brief survey of an exceptionally complicated subject matter behind us, we come now to the case which, to my mind, is the controlling precedent and binds this court.

II.

The majority agrees that *Lynch v. Donnelly*, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984), should be the starting point of our analysis. I believe that *Lynch* also ends our analysis. That case directly addresses and conclusively resolves the dispute we encounter here. Because the district court properly applied the holding in *Lynch*, I would affirm its judgment.

The concern in *Lynch* was a creche displayed under municipal auspices and encouragement, as is the case here. In describing the town of Pawtucket's creche display, the Chief Justice wrote that the scene was "essentially like those to be found in hundreds of towns or cities across the nation—often on public grounds—during the Christmas season." *Lynch*, 465 U.S. at 671, 104 S.Ct. at 1358. The creche was purchased by the town government, and assembled, disassembled, and stored by town workers. In the annual lighting ceremony, the mayor threw the switch to illuminate the creche.

In its opinion, the Supreme Court discussed at some length the competing constitutional arguments implicated by this display. It is helpful to distill key elements.

The Court first reaffirmed its holdings that complete separation between religion and state is not required, but that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Id.* at 673, 104 S.Ct. at 1359. Thus, official pronouncements by Presidents and Congress declaring Christmas a national holiday have done so permissibly "in religious terms." *Id.* at 676, 104 S.Ct. at 1360.

The Court renounced the absolutist approach that would mechanically invalidate all state actions that confer a benefit on or afford special recognition to a particular religion or to religion in general. Instead, the Court explained that the challenged governmental conduct must be examined "to determine whether, in reality, it establishes a religion or religious faith, or tends to do so." *Id.* at 678, 104 S.Ct. at 1351-62.

The Court assumed that the Christmas creche "advances religion in a sense," *id.* at 683, 104 S.Ct. at 1364, and conceded that it possessed "religious significance," *id.* at 687, 104 S.Ct. at 1366. The opinion made clear, however, that mere advancement of religion is not the test

for assessing constitutionality under the Estabilshment Clause. "[O]ur precedents plainly contemplate that on occasion some advancement of religion will result from governmental action." *Id.* at 683, 104 S.Ct. at 1364.

Although the creche "of course" is widely identified with one particular faith, in the Court's assessment this identification is no greater than that found in other cases upheld against Establishment Clause challenges. *Id.* at 685, 104 S.Ct. at 1365. "[N]ot every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid." *Id.* at 683, 104 S.Ct. at 1364.

The Court concluded: "To forbid the use of this one passive symbol—the creche—at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and legislatures open sessions with prayers by paid chaplains, would be a stilted overreaction contrary to our history and to our holdings. * * * Any notion that these symbols pose a real danger of establishment of a state church is farfetched indeed." *Id.* at 686, 104 S.Ct. at 1366.

Justice O'Connor joined in the majority opinion, but wrote separately to suggest a reformulation of the Establishment Clause analysis that would hinge on a state's "endorsement" of religion. *Id.* at 687, 104 S.Ct. at 1366 ("I concur in the opinion of the Court. I write separately to suggest a clarification of our Establishment Clause doctrine."). Justice O'Connor expressed some concern that a government's endorsement of religion might send "a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.* at 688, 104 S.Ct. at 1367 (O'Connor, J., concurring). She concluded that the resolution of this analysis in *Lynch* was

"in large part a legal question to be answered on the basis of injudicial interpretation of social facts." *Id.* at 694, 104 S.Ct. 1370 (O'Connor, J., concurring).

Also conceding the "religious and indeed sectarian significance of the creche," Justice O'Connor found that "the overall holiday setting . . . negates any message of endorsement of that content. The display celebrates a public holiday, and no one contends that declaration of that holiday is understood to be an endorsement of religion." *Id.* at 692, 104 S.Ct. at 1369 (O'Connor, J., concurring).

It should be emphasized that Justice O'Connor joined not only in the judgment of the Court but in the opinion of the other four Justices as well.[4] Her concurrence, therefore, must be read as agreement with the lead opinion written by the Chief Justice and suggesting, but not requiring, an alternate rationale for reaching the same result. Justice O'Connor, as well as that of the *Lynch* majority, concluded that although the creche contains a religious element, it nevertheless passes Establishment Clause scrutiny.

Despite the clarity of the Supreme Court's holding that a municipal creche display erected during the holiday season does not constitute an impermissible endorsement of religion, two courts of appeals, over strong dissents, have ruled otherwise. These courts have pointed to irrelevant and inconsequential variations in the location of the creche display and its positioning among other Christmas symbols as factors to justify disregarding the clear spirit of *Lynch*.

In *American Jewish Congress v. City of Chicago*, 827 F.2d 120 (7th Cir.1987), the Court of Appeals for the Seventh Circuit decided that a creche scene in the lobby

[4] *Cf. United States v. Mechanik*, 475 U.S. 66, 73, 106 S.Ct. 938, 943, 89 L.Ed.2d 50 (1986) (O'Connor, J., concurring) (concurring in result, but rejecting majority's reasoning).

of the Chicago City Hall violated the Establishment Clause. The court reasoned that the location inside a government building intensified the state's "alliance" with religion, and distinguished that display from the one in *Lynch* erected in a private park. On that basis, the panel majority thought itself free to declare the display unconstitutional.

In *American Civil Liberties Union v. City of Birmingham*, 791 F.2d 1561 (6th Cir.), *cert. denied*, —— U.S. ——, 107 S.Ct. 421, 93 L.Ed.2d 371 (1986), the Court of Appeals for the Sixth Circuit found fault with Birmingham's "unadorned" creche—one unaccompanied by secular holiday decorations. The court concluded that without nonreligious trappings to temper its impact, a Christmas creche conveys an unconstitutional sectarian message.

In both instances, the majority opinions reflect less an attempt to apply the Supreme Court's holding in *Lynch* than a disapproving rejection of its message. But the judicial hierarchical system in this country mandates faithful adherence by lower federal courts to a holding of the United States Supreme Court, "no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375, 102 S.Ct. 703, 706, 70 L.Ed.2d 556 (1982).

The powerful dissenting opinions in both cases demonstrate the errors of those majorities, critiques to which little need be added here. Some aspects merit emphasis, however. The *City of Chicago*'s governmental location distinction ignores the Supreme Court's observation in *Lynch* that the Pawtucket creche was essentially similar to those displays found nationwide—"often on public grounds." *Lynch*, 465 U.S. at 671, 104 S.Ct. at 1358. Municipal participation was no secret, and the Supreme Court treated the display as governmental action.

Moreover, the court of appeals' preoccupation with the Christmas display location in City Hall is especially per-

plexing in light of the Supreme Court's decision in *Marsh v. Chambers*. In that case, the challenged prayer service was conducted in the legislative chamber itself—not a public area of the capitol building. If the Supreme Court did not consider that practice a prohibited endorsement of the sectarian beliefs espoused by the legislatively-paid chaplain, it is difficult to understand why a creche displayed in a government building during the Christmas season cannot pass constitutional muster. Indeed, the fact that Christmas has been declared a national holiday by the state (and that action is not considered a forbidden endorsement) weighs heavily against the *City of Chicago* rationale.

Equally unpersuasive is the *City of Birmingham*'s adorned/unadorned distinction. *Lynch* simply does not support applying such a "Two Plastic Reindeer" rule.[6] As Justice O'Connor noted, the secular decorations surrounding the Pawtucket creche did not nullify its sectarian religious significance. Rather, the December holiday setting was the element that altered "what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any mes-

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[6] *See* Note, *Of Crosses and Creches: The Establishment Clause and Publicly Sponsored Displays of Religious Symbols*, 35 Am. U.L. Rev. 477, 495 (1986). Judge Nelson has described this distinction with the similarly fitting label, the "St. Nicholas, too" test. *City of Birmingham*, 791 F.2d at 1569 (Nelson, J., dissenting) ("a city can get by with displaying a creche if it throws in a sleigh full of toys and a Santa Claus, too").

Actually, the Santa Claus legend is derived from folklore surrounding the life of St. Nicholas, a Catholic bishop of the fourth century. In the Dutch and German customs, St. Nicholas delivers gifts to children on December 6. The secularization process in the United States combined the St. Nicholas tradition with the birth of Christ, and both became celebrated on December 25. *See* J. Barnett, *The American Christmas* 4, 24-48 (1954); E. Count, *4000 Years of Christmas* 57-63 (1948).

sage of endorsement of that content." *Lynch*, 465 U.S. at 692, 104 S.Ct. at 1369 (O'Connor, J., concurring).

This "unadorned" distinction, even if valid, is irrelevant here. The Pittsburgh creche was surrounded by traditional Christmas symbols, including wreaths, evergreen trees, and poinsettia plants, and served as a thematic backdrop for the County's traditional holiday choral program. The appellants' contention that these obviously secular symbols are not secular enough calls to mind Judge Nelson's admonition: "I question whether it is appropriate for the federal courts to tell the towns and villages of America how much paganism they need to put in their Christmas decorations." *City of Birmingham*, 791 F.2d at 1569 (Nelson, J., dissenting).

All of the courts of appeals have not disregarded *Lynch*. In the only unanimous post-*Lynch* appellate decision, the Court of Appeals for the Second Circuit rejected both the governmental location and the adorned/unadorned distinctions. *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided Court*, 417 U.S. 83, 105 S.Ct. 1859, 85 L.Ed.2d 63 (1985). There, the court found that a disclaimer sign attached to a creche served as an acceptable device to assure spectators that the municipality did not endorse religion. Though *Lynch* would not require such a sign, the court in *City of Chicago* refused to accept even that modification as a means of reducing the appearance of governmental endorsement.

The *City of Chicago* and *City of Birmingham* cases are surprising for their reexamination of the creche under *Lemon*, independent of the Supreme Court's application of that analysis in *Lynch*. Yet the Court in *Lynch* already had evaluated the creche display against the *Lemon* criteria and found it constitutional. First, the Court decided that the display had the secular purpose of depicting the historical origins of the Christmas holi-

day. *Lynch*, 465 U.S. at 680, 104 S.Ct. at 1362. Second, the Court concluded that the creche's primary effect constituted no greater an endorsement of religion than that found acceptable in prior Establishment Clause cases. *Id.* at 682, 104 S.Ct. at 1364. Third, the Court determined that Pawtucket's administrative entanglement in administering and maintaining the creche was de minimis. *Id.* at 684, 104 S.Ct. at 1365. But the Court did not end its discussion there. Rather, it proceeded to emphasize that the creche was a "passive" symbol, the banning of which would constitute "a stilted overreaction." *Id.* at 685-86, 104 S.Ct. at 1365-66.

The tone of *Lynch* is unmistakable. I have found no indication that the Pawtucket display survived constitutional scrutiny because it was situated in a private park rather than a county courthouse, or because it closely resembled a miniature golf course with candy-striped poles, talking wishing wells, and cut-out elephants. The civil government's recognition of the origins of Christmas during the holiday season simply was not perceived by the Supreme Court as a threat to the aims of the Establishment Clause. The Court all but dismissed the appellant's claim as much ado about nothing and, reading the opinion, one can imagine the Court steadfastly resisting the temptation of chiding, "Bah humbug!"

III.

The facts of the case at hand do not differ significantly from those in *Lynch*. The placement of the creche in the gallery of the Allegheny County Courthouse, accompanied by poinsettia plants and evergreens, does not violate the Establishment Clause simply because plastic Santa Clauses or reindeer are absent. Neither does placing the creche in the Courthouse during the Christmas season emit any more coercive effect than the paintings displayed in the Courthouse gallery.

Appellants have not challenged the high schools' choral singing programs that take place in the same location at the Courthouse, indeed using the creche as a scenic backdrop. Unlike the creche, the singing is not passive, but rather vocalizes unquestionably religious themes. Yet those carols also are part of this nation's cultural heritage. Should they too be censored from utterance in the Courthouse? What of a municipality's holiday banner bearing Tiny Tim's timeless petition, "God bless us, everyone"? Must the name of the holiday be changed to "Winter Solstice Day" so that there can be no government "endorsement" of a "religious overtone"?

Distilled to its essence, *Lynch* advocated an approach of moderation, understanding, and a sense of proportion in ruling on displays commemorating the Christmas season. I think the decision in this case strays from that course.

IV.

What, then of the menorah? The majority relies on cases that emphasizes the total grouping of the holiday symbols. It may help, therefore, to describe the spatial circumstances here. A narrow street separates the City-County Building in Pittsburgh from the Courthouse; a tunnel runs underneath, connecting the two. County offices and courts are located in the Courthouse.

The City-County Building also houses Allegheny County government offices, including the Register of Wills and the Prothonotary of the Common Pleas Court. In addition, the City-County Building also contains county courtrooms and the City of Pittsburgh offices. Rather than separate and unrelated structures, these two buildings are more accurately treated as a unified government complex. Viewed from the average citizen's perspective, the creche and the Christmas tree in the Courthouse together with the menorah affixed to the front of the City-County Building constitute but one large display commemoraing the holiday season.

I assume, as the Court did in *Lynch*, that the challenged symbol has religious significance. I assume further that the menorah, in this context, is associated with Chanukah, a religions holiday celebrated by persons of the Jewish faith.[6] Chanukah often occurs in late December. As the district judge explained, in displaying both Jewish and Christian holiday symbols, the local governments allowed those faiths to call attention to the miracles enriching their histories, thereby demonstrating the harmony of their ideals of "bringing light to the world."

Viewing these displays as a whole, I find that the "message" conveys no more government endorsement of religion than if the creche alone were exhibited.[7] Including a reference to Chanukah did no more than broaden the commemoration of the holiday season and stress the notion of sharing in its joy. By marking the Judeo-Christian aspects of the holiday season, the local governments appropriately called attention to the great pluralism that is the hallmark of religious tolerance in this county.

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[6] Chanukah—meaning the Days or the Feast of Dedication—is celebrated for eight days beginning on the twenty-fifth of Kislev in the Jewish calendar. It is basically a home festival, centering on the kindling of candles each evening at dusk. The festival commemorates the recapture in 165 B.C.E. of the Holy Temple in Jerusalem from the Syrian Greeks. In preparing to rededicate the temple, the Maccabees could locate only a one-day's supply of the sacred oil used to light the temple menorah. Nevertheless, the oil burned in the Menorah for eight continuous days until new oil could be prepared. The next year, Chanukah was set for perpetual celebration of the Jewish nation's victory over religious persecution. *See* H. Gaster, *Festivals of the Jewish Year* 234-53 (1978); M. Ickis, *The Book of Festival Holidays* 88-89 (1964).

[7] Unlike the posting of the Ten Commandments invalidated in *Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980), the menorah is not a permanent fixture on the Pittsburgh City-County Building; it is erected and dismantled in conjunction with the celebration of Chanukah.

I find no breach of the Establishment Clause here.

V.

Despite many opportunities to do so, the Supreme Court has never held that state practices which afford special recognition to religious groups are, for that reason alone, constitutionally infirm. Instead, the Court has expressly rejected such a view as "contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause." *Corporation of Presiding Bishop v. Amos*, — U.S. ——, ——, 107 S.Ct. 2862, 2869, 97 L.Ed.2d 273 (1987).

By publicly acknowledging the holidays of the various religions, "[w]e make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary." *Zorach*, 343 U.S. at 313, 72 S.Ct. at 683. In displaying the symbols of religious holidays during their celebration, "[w]e sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma." *Id.* Instead of contravening the Establishment Clause, such displays constitute "simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh*, 463 U.S. at 792, 103 S.Ct. at 3336.

These displays pose no threat to religious freedom, yet their suppression forebodes ominous consequences. I dissent.

APPENDIX II

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[2] THE COURT: Let the record show that it's about 5:25, the court room has been occupied by a number of people all day who apparently are awaiting the decision on this Motion for a Preliminary Injunction which seeks to enjoin both the County and City.

Let the record show that, therefore, we'll briefly state some short findings of fact and make a decision here.

The Motion for a Preliminary Injunction against the City and against the County will be denied.

This case presents a Motion for a Preliminary Injunction under the Establishment Clause, the First Amendment is applied to the States through the Fourteenth Amendment. In my view, the case of Lynch vs. Donnelly is the last teaching that I can find in this field, and I think this case is governed by it, although the facts are not the same. The facts, of course, are never precisely the same in any of the Establishment Clause cases.

Let the record show that in this case the City proposes to erect a menorah in front of the City Building on approximately December the 27th, and there is already erected and has been erected since November 26th on the main staircase of the County Courthouse a display which contains a nativity scene, sometimes spoken of as a creche. The display is shown in Exhibits D and F and various of the exhibits made part of the record. [3] The creche scene is a traditional one, not particularly large, not particularly small. It's surrounded by red and white Poinsettas and surrounded by a fence and sits upon the stairwell. It's part of a holiday celebration that the County Commissioners apparently foster and encourage, where every day during the Christmas season choirs come to this part of the Courthouse and assemble and sing music of various kinds, including some carols and some hymns, and some religious music, some

secular music. The program is well received. The Christmas decorations, of course, are part of the program.

There are some evergreen trees in other parts of the Courthouse. This particular place in the Courthouse is a beautiful, impressive place with murals on the walls which are lighted. Some of them show fallen warriors and angels and scenes of various kinds. One of the pictures shows the choir of one of the high schools involved standing behind the creche, and generally the creche merely contributes as part of the overall Christmas scene.

The menorah we have no pictures of. We understand what a menorah is and have seen one before and have seen them in Christmas displays. The City proposes to place the menorah on the steps of the City Building.

We find that the display of either the nativity scene or the menorah fails to convey a message of governmental enforcement of either religion. We find that the mere display presents [4] no appreciable risk of establishing either religion.

To put it another way, the displays here both of the nativity scene presently in place and the proposed placing of the menorah are de minimis in the context of the application of the Establishment Clause. It is noted that none of the people who enter the Courthouse are required to do anything; they are not required to read, or to sing, or to pause or to reflect. Neither are people required to pause or look or read or make any gestures where the menorah is concerned; they are merely displays.

They are said to be offensive. We think the people who have testified are sincere people and truthful, and they say that they find these displays offensive, but the Governments of the United States, Local and State and Federal do many things that are offensive to many people, and I find that mere offense is not sufficient to impel the Court to issue an injunction. There must be more substantial injury than mere offense that is felt inwardly. But it is not felt because one must read, or sing, or talk or pause, or do something affirmatively.

The mere displays, therefore, are found to be de minimis in the context of the First Amendment. I don't think there's any danger whatever that they will establish any religion. I don't think the County Commissioners or the Mayor and the City intend to affect anyone's religion, or even offend anyone. On [5] the contrary, I think the intention was to celebrate the holiday season, and I doubt that the County or City officials paused to think that they were offending anyone. So, herefore, I just do not see very much chance of the plaintiffs succeeding on the merits. I don't think that there has really been any appreciable harm. I don't think that the mere reference to religion is actionable.

Those findings, as brief and as incomplete as they are, are sufficient for this purpose, and we'll recess for the night.

CERTIFICATE

I hereby certify that the foregoing transcript is a true and accurate record of the Findings of Fact given in the above-entitled matter.

/s/ Virginia S. Pease
VIRGINIA S. PEASE
Official Court Reporter

APPENDIX III

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action 86-2617

AMERICAN CIVIL LIBERTIES UNION, *et al.*,
Plaintiffs

vs.

COUNTY OF ALLEGHENY, *et al.*,
Defendants

MEMORANDUM OPINION

BARRON P. McCUNE, District Judge

May 8, 1987.

The following is written to comply with Rule 52.

On December 10, 1986, the plaintiffs filed a complaint pursuant to 42 U.S.C. § 1983 seeking a temporary restraining order and a preliminary injunction prohibiting the defendant county from displaying a creche in the Allegheny County Courthouse during the holiday season and the defendant city from displaying a menorah in front of the City-County Building in Pittsburgh. The creche was already in place. The menorah was customarily erected during the celebration of Chanukah and it was assumed that it would be placed in front of the City-County Building, as usual, beside a Christmas tree, because the Mayor of the City had written to the presiding officer of the ACLU that he intended to permit the display. The buildings are in proximity to one another on Grant Street.

A temporary restraining order was not granted but a prompt hearing was afforded on the motion for a preliminary injunction. A declaratory judgment was also requested declaring that the expenditure of public funds for the storage of the displays and their erection, as well as the displays themselves, violated the First and Fourteenth Amendments.

A hearing was held on December 15, 1986, at the conclusion of which the court dictated findings from the bench. Those findings are incorporated by reference. I would add to those findings only that the county did not purchase the creche. It was donated by a religious society and a clergyman erects the creche. It is stored in the basement of the courthouse when not in use. Very little, if any, public funds are used for this purpose.

During the hearing Chabad moved to intervene to introduce its view of the significance of the display of the menorah. The objection of the plaintiff to that motion was sustained. Chabad later renewed the motion and we granted the motion for the purpose of hearing limited testimony preparatory to determining whether a permanent injunction should be granted or denied. Meanwhile the city filed a motion to dismiss which will be denied. A hearing was held on April 24, 1987, and these findings are added to those referenced above.

Chabad-Lubavitch is an organization or faction within the jewish religion which follows orthodox dogma. It requested the city from five years ago to permit a menorah to be displayed at the time of Chanukah in front of the City-County Building. Chabad furnished the menorah and the city permits the display and has the menorah erected and taken down by city employees. It is much smaller than the Christmas tree usually erected. It is stored in the City-County Building. In front of the tree and the menorah there is displayed a sign which proclaims the blessings of liberty as shown on a photograph which is part of the record.

The Chanukah menorah has no particular religious significance when placed in a public location beyond signifying a "Light to the World" somewhat like the Christmas message "Peace on Earth, Goodwill to Men."

Chabad advocates the display of Chanukah menorahs in public and private places during the holiday season all over the country to symbolize the lighting of the souls of the jewish people, i.e., to call on them to go forth and accomplish good and overcome evil.

The intervenors therefore wish the city's practice continued. They consider the message which the display brings to the public to be one of good will. The lighting of the menorahs also permits jewish families to participate in all of the holiday lighting which occurs and to show their children that they also have a reason to decorate with lights (see letter of Marlaini Darfler to the Ithaca Journal as part of Exhibit 18).

The expense to the city is minimal and of no consequence.

I fail to see how the display of the menorah violates the establishment clause. It may call to the attention of the public that jews also have a miracle to remember. Certainly the local governments should not be enjoined from allowing both faiths to call attention to the miracles which enrich their histories, either the virgin birth or the burning of one day's oil for many days while the jews sought to recapture their temple,[1] so long as the symbols are part of a holiday season display. I should think the joint displays a message that in Pittsburgh the faiths harmonize and both seek to send some light to the world at the holiday seasons. I cannot conceive that a court should forbid such a thing or declare it illegal.

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[1] Chanukah celebrates the recapture of the temple in Jerusalem from the Syrian Greeks is 165 B.C.E. The miracle, we understand to be the continuous light emanting for several days from but one day's supply of oil.

The first amendment merely states that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.

The plaintiffs rely on two cases which were decided subsequent to *Lynch v. Donnelly*, 465 U.S. 668 (1984). One case, *ACLU v. City of Birmingham*, 791 F.2d 1561 (6th Cir. 1986), *cert. denied* 107 S. Ct. 421 (1986) involved an isolated display of a creche on the lawn of a city hall and the other, *ACLU v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986), *cert. denied* 107 S. Ct. 458 (1986) concerned the isolated display of a cross on a municipal fire station. Both can be distinguished and are unpersuasive. *Lynch* teaches that the focus of the inquiry must be on the symbol in the context of the holiday season. In this context neither the county or the city should be enjoined. In the case of the county, the creche was but part of the holiday decoration of the stairwell and a foreground for the high school choirs which entertained each day at noon. In the case of the city, if there was any religious significance to the menorah it was but an insignificant part of another holiday display.

There is no evidence whatsoever that the defendants were motivated by religion. Were one to apply the three pronged test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) the plaintiffs have failed to show enough to justify our intervention because we find that the displays had a secular purpose, their purpose was not to advance or prohibit religion and they did not create an excessive entanglement of government with religion. Nor is there evidence that the displays have caused political division.

We will deny the motion for a permanent injunction as well.

An order follows.

/s/ Barron P. McCune
BARRON P. MCCUNE
Senior United States
District Judge

cc: Counsel of record.

IN THE UNITED STATES DICTRICT COURT
FOR THE WESTERN DICTRICT
OF PENNSYLVANIA

Civil Action 86-2617

AMERICAN CIVIL LIBERTIES UNION, *et al.*,
Plaintiffs

vs.

COUNTY OF ALLEGHENY, *et al.*,
Defendants

ORDER

AND NOW, May 8, 1987, the motion of the city to dismiss is denied. However the motions for a permanent injunction and for declaratory relief are denied.

/s/ Barron P. McCune
BARRON P. MCCUNE
Senior United States
District Judge

cc: James B. Lieber, Esq.
Roslyn M. Litman, Esq.
Jon Pushinsky, Esq.
Benjamin Wechsler, II, Esq.
A. Asher Winikoff, Esq.
George R. Specter, Esq.
Robert McTiernan, Esq.
George Janocsko, Esq.
Charles H. Saul, Esq.

APPENDIX IV

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-3395 & 87-3436

AMERICAN CIVIL LIBERTIES UNION, GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE and MALIK TUNADOR

v.

COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania and the CITY OF PITTSBURGH, a political subdivision of the Commonwealth of Pennsylvania

CHABAD,

Intervenor

AMERICAN CIVIL LIBERTIES UNION,
GREATER PITTSBURGH CHAPTER,
ELLEN DOYLE, MICHAEL ANTOL,
REVEREND WENDY L. COLBY,
HOWARD ELBLING, HILARY SPATZ LEVINE,
MAX A. LEVINE,
Appellants No. 87-3395

Malik Tunador,
Appellants No. 87-3436

D.C. Civ. No. 86-2617

SUR PETITION FOR REHEARING

BEFORE: GIBBONS, *Chief Judge*,
SEITZ, HIGGINBOTHAM, SLOVITER, BECKER,
STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN, and WEIS,
Circuit Judges

The petitions for rehearing filed by appellees County of Allegheny, City of Pittsburgh and Chabad in the above-entitled cases having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petitions for rehearing by the panel and the Court in banc, are denied. When the cases were decided Judge Weis was an active judge but he has now assumed senior status and has participated in the decision on the petitions as a senior judge. Judges Higginbotham, Stapleton, Mansmann, Hutchinson, and Scirica would grant rehearing by the court in banc. Judge Weis would grant panel rehearing.

BY THE COURT,

/s/ Morton Greenberg
Circuit Judge

DATED: Apr. 19, 1988

APPENDIX V

SUPERIOR COURT OF THE STATE
OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Case No. C577925

FRED OKRAND, a taxpayer,
Plaintiff,

vs.

GREG WILKINS, ETC., *et al.*,
Defendants.

ORDER RE: MOTIONS FOR
SUMMARY JUDGMENT

1. Applications of Union of American Hebrew Congregation, Pacific SW Council (UAHC) and American Jewish Congress for leave to file amicus curiae memorandum granted.

2. Defendant City's objections ot Exhibit C of opposition of plaintiff to defendant City's Motion for Summary Judgment—sustained (re: newspaper article).

Defendant City's objections to Rabbi Freehling's declaration—overruled.

Intervenor's general objections to Pais declaration—overruled. However, specific objections to paragraphs 2, 3, 4 and 7 thereof—sustained (hearsay).

Intervenor's objections to 9/23/86 and 11/29/85 letters—sustained.

Intervenor's objections to Rabbi Beerman's declaration—overruled.

Court declines to take judicial notice of the submitted New York Law Journal. Court also declines to consider any submitted newspaper articles.

Court does take judicial notice of documents submitted by defendant as requested in request filed 11/28/86 (encyclopedia excerpts, et al.)

3. It is clear that the subject Menorah has religious, cultural and historical significance relating to a substantial segment of the general citizenship of the City of Los Angeles, indeed the state and nation. The fact that this symbol has religious significance is not determinative. Many things in American public life have religious significance. Much of our government activity stresses religious foundations. The applicable California and United States Constitutional provisions do not require a purging of all religious symbolism in our public life, even though religious entanglements are prohibited. Each such symbolic manifestation must be tested with all of the surrounding circumstances of the moment to determine if there is some all-encompassing religious manifestation that crosses the line prohibited by the applicable California or United States Constitutions. The display of the subject Menorah is not prohibited activity.

The Menorah is not a symbol which honors, sponsors, or embraces a religion by the City of Los Angeles. Neither does it honor, sponsor, embrace, assist, aid, sustain or support the Jewish religion. It presents to the citizens of Los Angeles a visual display of history and culture. The display will undoubtedly educate and enlighten citizens and thus serves a valid public purpose. The fact it also has high religious significance to Jews does not mean its display does not also provide cultural and educational development to the citizenry at large. The difference between an eight and seven candle Menorah is also not determinative, even if one is more sacred than the other. Indeed, the general non-Jewish public undoubtedly would not know the difference and would, at

best, identify either a seven candle or eight candle Menorah with Jewish history and religion. Under either circumstance, the display of the symbol still does not cross the line separating church from state.

It is noted that in December, 1985, the Court temporarily enjoined the Menorah from being lit. That TRO was voided when the OSC Re: Preliminary Injunction was taken off calendar.

This Court grants Summary Judgment to defendant against plaintiff on the complaint herein filed. The complaint seeks an injunction against the display of the Menorah at all as being unconstitutional. The display of the Menorah is not unconstitutional. It is noted that the complaint recognizes that the City was not authorizing a religious candlelight ceremony to coincide with the display and the Chanukah celebration and seeks only to enjoin the display itself. The Court denies plaintiff's motion for Summary Judgment for the reasons stated above.

Counsel for defendants to give notice and prepare, file and submit judgment.

Dated: Dec. 17, 1986

ROBERT H. O'BRIEN
Judge of the Superior Court